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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
(WESTERN DIVISION)

**MEI LING,**

Plaintiff,

**–– *v.*––**

**CITY OF LOS ANGELES, CALIFORNIA; COMMUNITY REDEVELOPMENT AGENCY OF THE CITY OF LOS ANGELES;** Redrock NoHo Residential, LLC; JSM Florentine, LLC; Legacy Partners Residential, Inc.; FPI Management, Inc.; and Guardian/KW NoHo, LLC,

Defendants.

Case No. 2:11-cv-7774-SVW

**OPPOSITION TO CITY OF LOS ANGELES' MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE RULE 12(c)**

Hearing Date: August 20, 2012
Time: 1:30 p.m.
Courtroom: Number 6, 2nd Floor
Judge: Hon. Stephen V. Wilson

Complaint Filed: Sept. 20, 2011

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## INTRODUCTION

For more than six years, Plaintiff Mei Ling, a formerly homeless woman with a disability who uses a wheelchair, has sought to rent an accessible, affordable apartment in the redevelopment housing program operated by Defendant City of Los Angeles (the "City"), which is principally supported by federal and state funds. The City has moved for judgment on the pleadings on the sole ground that a primary recipient of federal funding such as the City cannot, as a matter of law, be liable for failing to ensure that its sub-recipients meet the requirements of § 504 of the Rehabilitation Act.

The City's motion should be denied for two reasons. First, the City utterly failed to comply in both substance and form with Local Rule 7-3, which requires parties to meet and confer before filing a motion. Second, as a primary recipient of federal funds, the City has an obligation under § 504 to ensure that its sub-recipients comply with the Rehabilitation Act. In this case, the United States Department of Housing & Urban Development ("HUD") conducted a review of the redevelopment housing program for compliance with the Rehabilitation Act and specifically found that the City (and CRA) violated § 504 by failing to monitor its sub-recipients.[1]

[1] In support of her opposition to a motion to dismiss filed by Defendant Community Redevelopment Agency for the City of Los Angeles ("CRA"), Ms. Ling asked the Court to take judicial notice of the HUD letter of noncompliance [Doc. 96, 96-1]. Inasmuch as the Court's July 6, 2012, Order [Doc. 109] is silent with respect to whether it took such requested notice, Ms. Ling renews that request for purposes of this opposition.

## STATEMENT OF FACTS

Plaintiff Mei Ling is a resident of Los Angeles, California. She is non-ambulatory and uses a wheelchair during all waking hours. Second Amended Complaint ("SAC") ¶ 2. Because of her physical disability, she cannot obtain employment and subsists on a small monthly stipend from the County of Los Angeles. *Id.*

The City and its Community Redevelopment Agency (the "CRA") are recipients of federal financial assistance from HUD. *Id.* ¶ 3. The City and its CRA use that federal financial assistance to fund private housing developments in Los Angeles. *Id.* The City and CRA have provided federal funding and other forms of support to housing developments within their redevelopment housing program without ensuring that the private housing providers comply with federal laws prohibiting housing discrimination on the basis of disability. *Id.*

Since 2006, Ms. Ling has sought to rent an affordable, wheelchair-accessible apartment unit at numerous apartment complexes within the redevelopment housing program that have received financial and other assistance from the City and the CRA, including The Lofts and NoHo 14, against which she has brought claims in this litigation. *Id.* ¶ 4.

Because Ms. Ling was unable to obtain affordable, wheelchair-accessible housing through the City's redevelopment housing program, she was forced to live in homeless shelters and transitional housing from approximately June 2006 to May 2009. *See id.* ¶ 6.

Since June 2009, Ms. Ling has lived at The Piedmont, an apartment building for seniors and people with disabilities in the

North Hollywood region of the City. Plaintiff's apartment unit at The Piedmont is not fully accessible to her. *Id.* ¶ 7. She is unable to use the shower or toilet in her unit, and cannot access reliable, affordable public transportation to and from her building. *Id.*

She seeks to hold the City responsible for its failure to operate the redevelopment housing program in a fashion to ensure that private housing developments that are built with government funding—such as the Lofts and NoHo14—do not discriminate on the basis of disability. As outlined below, the allegations of the SAC are sufficient to state a cause of action under § 504.

But Ms. Ling has, prior to filing this opposition to the City's Rule 12(c) motion, also filed a motion for leave to file an amended complaint. That amended complaint would add more specific factual allegations about the City's authority over the redevelopment housing program and the CRA, describe HUD regulations and notices imposing obligations on the City to monitor and enforce § 504 obligations against the CRA and private housing developments, and allege in detail that HUD has conducted a compliance review and concluded that the City (and CRA) violated § 504 by failing to monitor its sub-recipients. Ms. Ling believes the interest of justice would be served by granting her motion to amend.

## STANDARD FOR MOTIONS FOR JUDGMENT ON THE PLEADINGS

"A Rule 12(c) motion is functionally identical to a motion pursuant to Fed. R. Civ. P. 12(b)(6)." *Lonberg v. City of Riverside*, 300 F. Supp. 2d 942, 945 (C.D. Cal. 2004) (citing *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th

Cir.1989)). Judgment on the pleadings is proper only when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. *See Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir.1989). As with Rule 12(b)(6) motions, in addition to assuming the truth of the facts pled, the court must construe all reasonable inferences drawn from these facts in the plaintiff's favor. *See Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989). A court may consider matters of public record subject to judicial notice. *In Re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 150 (C.D. Cal. 2007) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 688-90 (9th Cir. 2001). If the court grants the motion, it may grant leave to amend. *Lonberg*, 300 F. Supp. 2d at 945; *see Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) ("We consistently have held that leave to amend should be granted unless the district court "'determines that the pleading could not possibly be cured by the allegation of other facts.'")

## ARGUMENT

### I. THE CITY'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE CITY FAILED TO MEET AND CONFER BEFORE FILING THE MOTION AS REQUIRED UNDER LOCAL RULE 7-3

The City's motion for judgment on the pleadings should be denied because the City failed to comply with the letter and spirit of the meet and confer requirement contained in Local Rule 7-3. Local Rule 7-3 states in relevant:

> [Unless otherwise provided for in these Rules], counsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, *preferably in person*, the substance of the contemplated motion and any potential resolution. If the proposed motion is one which under the F.R.Civ.P. must be filed within a specified period of time (*e.g.*, a motion to dismiss pursuant to F.R.Civ.P. 12(b)) . . . then this conference shall take place at least five (5) days prior to the last day for filing the motion; otherwise, the conference shall take place at least ten (10) days prior to the filing of the motion.

Civ. L.R. 7-3 (emphasis in original).

The City's counsel did not meet and confer with Plaintiff's counsel within the meaning of Local Rule 7-3. Beyond a broad assertion that the City would seek dismissal on the grounds applicable to the CRA in the Court's Order of July 6, prior to July 25, 2012, the parties' counsel never had any meaningful discussion about the contemplated motion for judgment on the pleadings, let alone a thorough discussion about "the substance of the contemplated motion and any potential resolution" as required under the Local Rules. *See* Civ. L.R. 7-3.

The City's motion certifies that a conference of counsel took place on July 11, 2012 and July 21, 2012. Counsel has no record of any conversation between counsel about this case on those dates. Decl. of M. Allen in Supp. of Opp. to Mot. for J. on the Pleadings ("Allen Decl.") ¶¶ 6, 12.

On July 18, 2012, counsel for the City sent an email inviting Plaintiff's counsel, for the first time, to meet and confer regarding a motion for judgment on the pleadings. *Id*. ¶ 7, Ex. 2. On July 20, 2012, counsel for the City sent another email seeking to meet and confer. That same day, Plaintiff's counsel responded by email, notifying the City that Ms. Ling would move to amend her complaint to allege additional facts concerning the City's liability, and that the City's motion might become moot if the Court granted leave to amend. *Id*. ¶¶ 9, 10, Ex. 3.

On Friday, July 20, 2012 at 10:07 p.m. Eastern Time, counsel for the City sent an email stating that the City still intended to move forward with its motion for judgment on the pleadings. Counsel for the City stated that she would be in the office on Monday if Plaintiff's counsel wanted to discuss the motion. *Id*. ¶ 11, Ex. 4. Plaintiff's counsel was out of the office most the day on Monday. Shortly after he returned to the office, the City filed its motion for judgment on the pleadings. The parties' counsel never had any oral discussion of the substance of the City's motion let alone a discussion about the respective positions of the parties as contemplated by Local Rule 7-3. *See Superbalife Int'l v. Powerpay*, No. CV 08-5099, 2008 WL 4559752, at *2 (C.D. Cal. Oct. 7, 2008) (holding that the failure to have an oral discussion about a contemplated motion failed to meet the requirements of Local Rule 7-3 and denying motion to dismiss based on failure to comply with the Local Rule).

The City did not make a good faith attempt to substantially comply with Local Rule 7-3. An exchange of brief emails does not satisfy the requirements of the local rule, which requires a

thorough discussion of the motion and the parties' positions. *Singer v. Live Nation Worldwide, Inc.*, No. SACV 11-0427 DOC (MLGx), 2012 WL 123146 (C.D. Cal. Jan. 13, 2012) (holding that an in-writing conferences is insufficient to meet the meet and confer requirement under Local Rule 7-3 and denying motion for summary judgment because the defendants failed to comply with the Local Rule). Similarly, the parties' general discussions about the merits of Plaintiff's claims in another similar case do not satisfy the requirements of the Local Rule. *See id.*, at *2 (stating that general conversations of the merits are not meet and confer efforts within the meaning of Local Rule 7-3.)

Prior to the filing of the motion, Plaintiff's counsel never had a chance to discuss with counsel for the City the substance of the City's motion, the legal authority supporting a claim against the City for failing to ensure that its sub-recipients meet the requirement of § 504, or HUD's compliance review that specifically found that the City violated § 504 by failing to monitor its sub-recipients. Had the City sincerely engaged in the conversation required by Local Rule 7-3, it would have learned that the more detailed factual allegations Ms. Ling proposed in her motion to amend would render the City's motion moot. Instead of picking up the phone, counsel for the City simply declared, in e-mail form, that the City intended to file its motion, saying only:

> I understand you intend to file a motion for leave to amend, however, we would oppose the motion and do not believe that the proposed additions to the complaint would change the Court's ruling on CRA's Motion to Dismiss, upon which we intend to rely in our Rule 12(c)

> Motion. Given the trial schedule set by the Court, I don't think we can wait until we have a ruling on your motion for leave to amend before filing our motion. If you want to discuss further, I will be in the office on Monday.

Allen Decl. Ex. 4.

The City not only failed to comply with the substantive requirements of Local Rule 7-3 but also failed to comply with the procedural requirements of the Local Rule. Local Rule 7-3 requires that the meet and confer session occur ten (10) days before the filing of the motion. Even if the exchange of emails qualified as a meet and confer under the Local Rule, which it does not, the City filed its motion for judgment on the pleadings a mere three days after the "e-mail meet and confer," two of which were over the weekend. *Singer*, 2012 WL 123416, at *2 (noting that the defendant filed its motion just three days after a letter was faxed and sent); *Valdovinos v. County of Los Angeles*, No. CV 06-7580 JVS (SHx), 2008 WL 2872648, at *2 (C.D. Cal. July 23, 2008) (finding that the defendants filed motions in limine four days after they sent a fax setting forth the substance of their motions, two of which were over the weekend, and denying motions in limine for failing to comply with Local Rule 7-3.)

The City's failure to comply with Local Rule 7-3 in both substance and form prejudiced Plaintiff. If a meet and confer consistent with Local Rule 7-3 had been held and the parties had had an opportunity to thoroughly discuss the City's motion, Plaintiff's counsel would have discussed the proposed amendments to the complaint, the case law holding that recipients of federal

funds must ensure that their sub-recipients comply with § 504, and HUD's compliance review that specifically found that the City violated § 504 by failing to monitor its sub-recipients and the need for the City's motion might have been obviated.

Even if the meet and confer was unsuccessful, Plaintiff would have had more information about the basis for the City's motion and more time to research and draft an opposition. The failure to have a meet and confer deprived Plaintiff of any opportunity to learn about the substantive basis for the City's motion and forced Plaintiff to prepare an opposition to the City's motion in just six days.[2] If the City met the substantive and procedural requirements of Local Rule 7-3, Plaintiff would have been better equipped to prepare an opposition because the parties would have engaged in substantive discussions about the parties' respective positions and Plaintiff would have had 17 days to research and draft an opposition to the City's motion rather than six days.[3]

The City's motion for judgment on the pleadings should be denied because of the City's abject failure to comply with Local Rule 7-3.

## II. PLAINTIFF STATES A CLAIM AGAINST THE CITY UNDER § 504 OF THE REHABILITATION ACT

Ms. Ling properly states a claim against the City under § 504 for failing to ensure that its sub-recipients comply with the

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[2] The City did not file its motion for judgment on the pleadings until 7:18 p.m. EST on July 23, 2012.

[3] The local rules provide that a motion may not be filed until 10 days after a meet and confer and require that an opposition to a motion be filed seven days after the motion. Civ. L.R. 7-3, 7-9.

Rehabilitation Act. The City incorrectly contends that it is entitled to judgment on the pleadings because, as a matter of law, there is no duty to monitor its sub-recipients for compliance with § 504. There is, however, persuasive legal authority that a primary recipient of federal funds such as the City, may be liable for its failure to ensure that its sub-recipients comply with § 504.

All entities receiving federal financial assistance must comply with the anti-discrimination provisions of § 504 of the Rehabilitation Act, 29 U.S.C. § 794(a). Section 504 provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." 29 U.S.C. § 794.

As a primary recipient of tens of millions of dollars in HUD funds each year, the City is required, by operation of law, to comply with the Rehabilitation Act and HUD's implementing regulations, because Congress has exercised its authority under the Spending Clause to establish that obligation on recipients of federal funds. *See Koslow v. Commonwealth of Pennsylvania,* 302 F.3d 161, 175-76 (3d Cir. 2002) ("Through the Rehabilitation Act, Congress has expressed a clear interest in eliminating disability-based discrimination in state departments or agencies. That interest, which is undeniably significant and clearly reflected in the legislative history, flows with every dollar spent by a department or agency receiving federal funds."). The obligation to comply attaches to all the activities of a department or agency. *Id.; see also Lovell v. Chandler,* 303 F.3d 1039, 1051 (9th Cir.

2002) (holding that the Rehabilitation Act represents a valid exercise of Congress's spending power, and that "Congress has a strong interest in ensuring that federal funds are not used in a discriminatory manner and in holding states responsible when they violate funding conditions." )

That "strong interest" would be undermined if primary recipients of federal funds could simply shirk their non-discrimination obligations by granting those funds to sub-recipients who were not bound by those same obligations. In other words, because that interest "flows with every dollar" the City receives from HUD, the City cannot "launder" these federal funds and wash away the federal obligations. HUD's regulations interpreting § 504 similarly support the conclusion that the City as the primary recipient of federal funds may be liable for failing to ensure that its sub-recipients comply with § 504. HUD's regulations broadly define a recipient not only as a City that receives federal financial assistance but also its "successor[s], assignee[s] or transferee[s]." 24 C.F.R. § 8.3.

HUD's regulations further prohibit the City "directly or through contractual, licensing, or other arrangement" from discriminating in violation of the Rehabilitation Act and prohibit a recipient from perpetuating the discrimination of another by aiding or perpetuating discrimination by providing significant assistance to another entity that in turn discriminates. *See* 24 C.F.R. § 8.4(b)(1)(v) (providing that it is unlawful to "[a]id or perpetuate discrimination against a qualified individual with handicaps by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any

housing, aid, benefit, or service to beneficiaries in the recipient's federally assisted program or activity."); 24 C.F.R. § 8.4 (b)(4)(i) ("In any program or activity receiving Federal financial assistance from the Department, a recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would: (i) Subject qualified individuals with handicaps to discrimination solely on the basis of handicap.").

Federal courts have repeatedly interpreted the Rehabilitation Act to impose a duty on a primary recipient of federal funds to ensure that its sub-recipients comply with § 504. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 284-287 (2d Cir. 2003); *Jose P. v. Ambach*, 669 F.2d 865, 871 (2d Cir. 1982); *Emma C. v. Eastin*, 985 F. Supp. 940, 948 (N.D. Cal. 1997).

For example, in *Henrietta D.*, the Second Circuit held that the primary recipient (the State of New York) had a duty under § 504 to supervise sub-recipients, such as New York City, in the delivery of federally-funded social services. First, the Second Circuit reasoned that the Spending Clause imposed supervisory liability upon recipients of federal funds under § 504. The Second Circuit explained that Spending Clause legislation such as § 504 is interpreted under contract law principles and that the common law of contracts strongly suggests that the primary recipient of federal funds "is liable to ensure that localities comply with the Rehabilitation Act in their delivery of federally-funded [] services." *Id.* at 286. The Second Circuit held that under contract principles, "once a party has made a promise, it is responsible to the obligee to ensure that performance will be satisfactory, *even if*

*the promising party obtains some third party to carry out its promise*." *Id.* (emphasis supplied). The court found that in accepting federal funds, the state as the primary recipient of federal social service funds "promised that all its programs will comply with the mandate of the Rehabilitation Act." *Id.* (citing 29 U.S.C. § 794 and *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986)). The Second Circuit concluded that the state was "liable to guarantee that those it delegates to carry out its programs satisfy the terms of its promised performance including compliance with the Rehabilitation Act." *Henrietta D.*, 331 F.3d at 286.

Second, the Second Circuit held that the regulations implementing the Rehabilitation Act strongly supported the view that a primary recipient may be liable for the failure of its sub-recipients to comply with § 504. *Id.* The Court found that "the regulations define a covered "recipient" to include not only the State, but also any of its "successor[s], assignee[s], or transferee[s].'" *Id.* (quoting 28 C.F.R. § 41.3(d)). The court noted that the Department of Justice, in explaining a parallel ADA regulation stated, "'All governmental activities of public entities are covered, even if they are carried out by contractors. For example, a State is obligated by title II to ensure that the services, programs, and activities of a State park inn operated under contract by a private entity are in compliance with title II's requirements.'" *Henrietta D.*, 331 F.3d at 286 (quoting 28 C.F.R. pt. 35, App. A. at 517.)

Other courts have relied on similar regulations implementing § 504 to conclude that a primary recipient of federal funds is

liable for failing to ensure that its programs do not discriminate based on disability. In *Jose. P.*, 669 F.2d at 871, the Second Circuit concluded that the state as the primary recipient of federal educational funds was liable for failing to ensure that local school districts meet the requirements of § 504, relying a regulation that prohibited aiding or perpetuating discrimination "by providing significant assistance to another entity that in turn discriminates." *Id.* (citing 34 C.F.R. § 104.4(b)(1)(v)). Similarly, in *Emma C.*, 985 F. Supp. at 948, a district court in the Northern District of California concluded that the state as the primary recipient of federal educational funds could be liable for perpetuating the discrimination of a local school district, relying on the same regulation cited by the Second Circuit and on a regulation that prohibited a recipient "directly or through contractual, licensing, or other arrangement" from discriminating in violation of the Rehabilitation Act. *Id.* (citing 34 C.F.R. § 104.4(b)(1)(v) and 34 C.F.R. § 104.4(b)(4)).

In this case, the City can be held liable as the primary recipient of federal housing funds for failing to ensure that the CRA and the housing developments in the redevelopment housing program comply with § 504 under a Spending Clause analysis. Ms. Ling has alleged that the City is the recipient of federal housing funds (SAC ¶ 32) and that the City failed to ensure that its sub-recipients complied with § 504 (SAC ¶ 3). The City in accepting federal funds promised that its programs will comply with the mandate of the Rehabilitation Act. *See Henrietta D.*, 331 F.3d at 286. Under the Spending Clause, the City, as the primary recipient of federal housing funds, is liable for failing to

"guarantee that those it delegates to carry out its programs satisfy the terms of its promised performance including compliance with the Rehabilitation Act." *See id.*

Finally, any doubt about whether the City may be liable for failing to ensure that its sub-recipients in the redevelopment housing program comply with § 504 in this case can be laid to rest by reviewing HUD's compliance review. HUD conducted a compliance review of the City and the CRA's redevelopment housing program for compliance with § 504 and Title II of the ADA. HUD specifically found that the City and the CRA failed to monitor its sub-recipients to ensure their compliance with § 504 and that the failure to monitor violates the Rehabilitation Act. *See* HUD Letter of Findings of Noncompliance, January 11, 2012, attached as Ex. 1 to Plaintiff's Request for Judicial Notice.

Thus, the City can be held liable for failing to ensure that its sub-recipients such as the CRA and the housing developments within the redevelopment housing program comply with § 504 as a matter of law.

## III. PLAINTIFF REQUESTS LEAVE TO AMEND

The City moves for judgment on the pleadings on the ground that a primary recipient cannot be liable for the failure of its sub-recipients to comply with § 504 as a matter of law. Ms. Ling has demonstrated that the City's legal contention is incorrect and HUD has specifically found that the City failed to monitor its sub-recipients in the redevelopment housing program for compliance with § 504. In their motion for judgment on the pleadings, the City has not identified any deficiencies in Plaintiff's complaint.

Nevertheless, in the interest of clarifying the factual and legal bases of the City's obligations under § 504, and to cure any deficiency in her pleadings the Court might identify in the context of the City's Rule 12(c) motion, Ms. Ling has sought leave to amend. *See* Proposed Third Amended Complaint attached as Ex. 1 to Plaintiff's Motion for Leave to File Third Amended Complaint. *See Lonberg*, 300 F. Supp. 2d at 945; *Bly-Magee*, 236 F.3d at 1019.

The proposed Third Amended Complaint alleges additional facts against the City demonstrating that it failed to ensure that the CRA and housing developments in the redevelopment housing program complied with § 504. Specifically, Ms. Ling alleges that HUD found in its compliance review of the CRA and the City that they failed to monitor housing developments in the redevelopment housing program to ensure compliance with § 504 and that the failure to monitor violates § 504. Proposed Third Am. Compl. ¶¶ 45-47; Request for Judicial Notice. Ms. Ling also alleges that a city ordinance requires that the City oversee the CRA (Proposed Third Am. Compl. ¶¶ 19-20) and that HUD has issued notices requiring the City to monitor the compliance of its sub-recipients to ensure that federally funded housing developments meet the accessibility requirements of § 504 (*id*. ¶ 43; *see also* HUD accessibility notices attached as Ex. 2 to Request for Judicial Notice).

## CONCLUSION

For the foregoing reasons, Plaintiff Mei Ling respectfully requests that the Court deny Defendant City of Los Angeles' Motion for Judgment on the Pleadings.

Dated: July 30, 2012

Respectfully submitted,

/s/ D. Scott Chang

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**CERTIFICATE OF SERVICE**
**CENTRAL DISTRICT OF CALIFORNIA**

I hereby certify that on this 30th day of July, 2012, I filed the foregoing Plaintiff's Opposition to the City of Los Angeles' Motion for Judgment on the Pleadings Pursuant to Federal Rules of Civil Procedure Rule 12(c) using the Court's CM/ECF filing system, which shall serve as notice of such filing on all counsel of record.

/s/ Miriam Becker-Cohen
Miriam Becker-Cohen